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Supreme Court of the United States.

OCTOBER TERM, 1964.

No.

FREDERICK MOYNIHAN,
Petitioner,
v.
NEW YORK CENTRAL RAILROAD COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petitioner, Frederick Moynihan, prays that a writ of certiorari issue to review the judgment of United States Court of Appeals for the First Circuit entered in the above case on November 20, 1964, petition for rehearing having been denied on December 22, 1964.

Opinion Below.

No opinion was rendered in the District Court.

The opinion of United States Court of Appeals for the First Circuit is printed in the appendix hereto (pp. 13-19) and also annexed to the record of the Court below (R. 219), and is reported in 338 F. 2d 644.

Jurisdiction.

The judgment of the Court of Appeals for the First Circuit was entered on November 20, 1964 (R. 226). A timely

petition for rehearing was filed on December 3, 1964, and the same was denied on December 22, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

Questions Presented.

1. Whether a Court of Appeals may apply substantive law which is in direct conflict with the applicable state law as set forth by the highest Court of the State.

2. Whether a Court of Appeals may disregard jury findings supported by evidence and thereby violate the Seventh Amendment right of trial by jury.

The issue is whether a "scaler" or "sampler" of foreign import goods at work at a place designated by his employer in a shed of an ocean pier operated by the defendant is entitled to hold a verdict awarded him by a trial jury in an action against the pier operator for personal injuries suffered when "skids," constructed by defendant and furnished for the use of the pier, and being wood platform assemblies, weighing each a thousand pounds or more, and being thirteen feet long, four feet wide and of an "edge" six inches wide, fell over on him from an upright position, that is, from "on edge"—the long edge—after having been in that position in the shed for more than a day prior and within an hour of having been measured by tape but not handled by carpenter employees of the defendant who (1) knew that the position "on edge" was not the usual custom and practice, knew that they were not supposed to be on edge, and knew the position to be dangerous, knew that in that position they were "unbalanced," and (2) took no counter-measure and gave no warning ("it ain't up to us") of danger to plaintiff and other scale workers at their task only a few feet away. The Court below convicted the plaintiff as matter of law of having knowledge of the danger by reason of an

answer on cross-examination, "I know it was dangerous," to a question, "Did you know then it was dangerous for them to be on edge?" The Court below so ruled notwithstanding that it declared its own inference that Shute, the employer of plaintiff, did not know of the danger where, upon consideration of a danger, he had touched the skids and considering their weight had thought there was no danger of their falling (footnote 2, Opinion of Circuit Court of Appeals). The Court brushed aside plaintiff's contention that the jury could have found in fact that plaintiff was expressing knowledge acquired after the fact. Ignored was the effect of another answer on cross-examination, that he did not expect the skid to come over; and, on redirect, that the workers were going along at the normal rate of speed, he saw the skid and that was it; he did not think they should have been there or should not have been there.

Constitutional Provision Involved.

The Seventh Amendment to the Constitution provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

The Court of Appeals has invaded the province of the jury and has substantially interfered with plaintiff's right to a decision by the jury on fact questions.

Conflict with Applicable State Law.

The decision is in total conflict with applicable decisions of the Supreme Judicial Court, Commonwealth of Massa-

chusetts, holding that petitioner has a right of action in the circumstances here presented.

Statement.

This action was originally brought by plaintiff, Frederick Moynihan, of Boston, in the State Court, against the defendant, a corporation. The defendant removed the action to the District Court on the grounds that it was a citizen of Delaware and that the amount in controversy exceeded the jurisdictional amount of $10,000.

The plaintiff's declaration alleged that he received severe personal injuries while working on Pier 3, East Boston, when he was struck by two skids that fell on him, said skids being owned and controlled by the respondent, New York Central, and the injuries being due to negligence of the New York Central in permitting the skids to fall on him.

The claim of Moynihan to trial by jury was endorsed on his writ as sued out by him. Jury trial was had before Judge McCarthy in the District Court at Boston, and resulted in a verdict of $60,000 for plaintiff.

Defendant railroad was lessee and operator of Pier 3, East Boston. Moynihan was an employee of one Shute, a public weigher and sampler of import cargoes. An ocean carrier which paid defendant $100 a day when it used the pier had brought certain cargo to dockside in a freighter, the same had been unloaded onto the pier, and Shute confirmed arrival notice from the consignee with the ocean carrier's office. On November 28, 1962, he put his men to work to weigh and sample drums of aluminum oxide. Defendant's terminal manager or freight agent at Pier 3 testified that Shute and his men had a right to be on the pier—"it is a custom over the years that certain people that have operations to perform on the pier are allowed to go on the pier."

Shute set out the work and put his men to their tasks in a certain shed. Five or six feet away two "skids" were leaning against the wall on the long edge. These skids, which had been built and maintained by defendant and provided by it for the "use of the pier," were constructed of lumber, thirteen feet long, four feet wide, and six inches on the edge, and each weighed around 1,000 pounds. They had been in that position for at least a day. On that morning Shute put his hand on the skids and felt they were large and heavy and they should not move. This was in the process of setting up the work and putting his men to work. While the men were at work and about an hour before the time of the accident two carpenters, Scroggie and Benoit, experienced employees of the defendant, came to the place in performance of their assignment and measured the length of the skids by a tape without touching them. They testified that they found them "on edge," that is, not flat. Defendant's employee Scroggie testified that it was not the usual custom and practice to keep the skids on edge. Defendant's employee Benoit testified they were not supposed to be on edge; he knew it to be dangerous. Scroggie, being asked if the reason for laying them flat on the floor was that they were in danger of falling down if left on edge, replied: "Well, they are unbalanced." Griffin, defendant's agent in charge of the pier, testified that normal practice with the railroad is that the skids be on the flat; it is a safety measure. The skids are not supposed to be on edge: "The railroad men would not leave them on edge if we saw them." Moynihan testified that nobody gave him a warning. While he was working with his back to them the skids fell over without any advance indication of trouble and pinned him down, breaking his right leg. Asked if they did anything about the skids, Benoit, defendant's carpenter, replied: "No, it ain't up to us."

Certain questions were asked of Moynihan on cross-examination, to establish that he knew of the danger of the position of the skids. He saw the skids leaning up against the wall.

"XQ. They looked all right to you? A. Yes.

"XQ. You weren't worried about them there? A. Well, that wasn't my job, I had nothing to do with it. I had no reason to worry about it.

"XQ. Well, you were over there to work near them? A. That's right.

"XQ. And you didn't tell anybody to move them before you went to work in that location, did you? A. No, because I figured—

"XQ. Please, answer the question. Did you tell anybody? A. I didn't tell nobody.

"The Court. Why, why didn't you tell somebody?

"The Witness. Well, I had no reason to because we had nothing to do with the skids.

"The Court. You never used them?

"The Witness. We never use them. We are working on a different item altogether.

"XQ. (By Mr. Donahue) And you didn't expect any trouble from them, did you? A. Well, I never expected no trouble, no.

"XQ. They looked all right to you? A. Well, they were on edge. I know they were dangerous because they are supposed to be lying flat on the deck. That's a safety rule.

"XQ. Did you see them on edge? A. Yes.

"XQ. Did you know then it was dangerous for them to be on edge? A. I know it was dangerous.

"XQ. Did you go to anybody and say, 'Move those down'? A. No, I had no reason to.

"XQ. Because you didn't worry about them? A. Well, I figured the railroad or shipping company was going to use them fast, so—they were around there and they were going to use them right away." (R. 31, 32.)

"Q. (By Mr. Greenberg) Mr. Moynihan, in the work you were doing there, did you have anything whatsoever to do with those skids? A. Not a bit, no.

"Q. It had nothing to do with your work? A. We had nothing to do with them at all.

"Q. And where you were doing your work was where you were told to do it, is that right? A. That's right.

"Q. And now you told his Honor and the Jury you saw the skids about an hour before your accident? A. Yes, when I first entered the section.

"Q. You didn't pay any particular attention to them? A. No.

"Q. You just saw them against the wall? A. Yes, saw them and took it for granted somebody was using them.

"Q. And from the time of nine o'clock when you saw the skid for the first time and the accident at ten— A. Yes.

"Q. Did you take any time off? A. We take time off at ten—

"Q. Before your accident, did you take any time off? A. No.

"Q. Were you working fast or slow? A. We were going along at the normal rate of speed.

"Q. And you saw the skid and that was it? A. That's it.

"Q. You didn't think they should have been there or shouldn't have been there? A. No." (R. 38.)

Reasons for Granting the Writ.

I. The order of the Court below that a judgment be entered for the respondent has, in effect, deprived petitioner of his constitutional right to trial by jury.

In a number of ways the Court of Appeals arbitrarily substituted its judgment of facts for facts found by the jury. For one matter, it ruled that plaintiff's answer, "I know it was dangerous," was not an answer in the present tense, and thus indicated after-acquired knowledge of the danger of the skids, but was an answer to be taken in the past tense as showing knowledge at the time of the accident. Thus the foundation of the Court of Appeals judgment was erected by means of a gross invasion of the right of the jury to determine the meaning of plaintiff's language. The Court of Appeals indulges in elaborate analysis of plaintiff's responses in order to justify its conclusion. The jury by the same process of analysis could equally have determined that the plaintiff was referring to knowledge acquired after the accident.

The plaintiff had a right to the determination made by the jury.

> *Williamson* v. *Feinstein,* 311 Mass. 322, 325.
> *Murphy* v. *Boston & Maine Railroad,* 319 Mass. 413.
> *Howes* v. *Kelman,* 326 Mass. 696.
> *Brown* v. *Metropolitan Transit Authority,* 345 Mass. 636, 640.

It is also the law of Massachusetts that all the testimony of a party on a particular fact is to be considered by the jury, and the jury may give a total effect to the party's testimony which is inconsistent with the effect of particular selected portions.

> *Fitzgerald* v. *McClymont,* 314 Mass. 497, 499.

Here again the Court of Appeals has violated the principle of jury trial by preventing consideration of other testimony of plaintiff that he did not expect to get hit; he did not expect the skid to come over; he was not disturbed about their leaning; they were the furthest from his mind because he was busy with his own drum; he saw them (the skids) and took it for granted somebody was using them; work was at the normal rate of speed and he saw the skid and that was it; he did not think they should have been there or shouldn't have been there—all cumulatively allowing a jury inference that plaintiff did not then know the danger of the situation, especially where the two railroad employees, Scroggie and Benoit, had been measuring the skids in the range of observation of the scale workers, a circumstance that could have given an impression of safety to the scale workers only a few feet away, and that could have imposed an affirmative duty of expressing the warning called for by the knowledge of Benoit and Scroggie that the skids were in a dangerous "on edge" position.

Within the rules of decision firmly promulgated by this Court the case was one where the jury's decision was final as having a reasonable basis and where special and important reasons exist for issuance of the writ of certiorari for the reason that the lower Court has deprived this litigant of his right to a jury determination.

Senko v. *LaCrosse Dredging Corp.*, 352 U.S. 370, 374.

Gibson v. *Phillips Petroleum Co.*, 352 U.S. 874.

II. The decision of the Court of Appeals is in direct conflict with controlling decisions of the highest Court of the State.

Where the plaintiff was an invitee of the defendant operator of the pier (*Wendell* v. *Baxter*, 12 Gray 494; *Silva* v. *Henry & Close Co.*, 279 Mass. 334; *Hayes* v. *Boston Fish*

Market Corp., 319 Mass. 556) the defendant owed to him a duty to use reasonable care to keep the premises in a reasonably safe condition or to warn him of dangers not obvious to the ordinary person but which were known or should have been known to it.

The Massachusetts law recognizes that an actionable wrong has been done to a person in the position of the plaintiff notwithstanding a quantum of knowledge on the part of the injured person that the offending object was in a condition of danger to him.

> *Barrett* v. *Builders' Patent Scaffolding Co., Inc.*, 311 Mass. 41.
>
> *Hayes* v. *Boston Fish Market Corp.*, 319 Mass. 556.
>
> *Lajeunesse* v. *Tichon's Fish & Fillet Corp.*, 328 Mass. 528.

In *Hayes* the plaintiff, having alternative routes, chose as his path of access to his fishing vessel a cap log which he had observed to be covered with fish slime. Held: that the plaintiff could have been found to have used reasonable care and that he should hold his verdict. In *Lajeunesse* plaintiff was taking out bundles from premises whose flooring intermittently became slimy from clogged fish drains. At page 531 of *Lajeunesse*: "In other classes of cases it has often been held that a plaintiff is not negligent as matter of law merely because he saw or knew the danger, especially where he had a duty to perform which took him into proximity to it."

In its aspect least favorable to the plaintiff, the plaintiff's case is at least on a level with the holding in *Barrett* v. *Builders' Patent Scaffolding Co., Inc.*, 311 Mass. 41. There the plaintiff was pitched from a scaffolding by the tilting of a warped board on the platform on which he was working. He had observed the use of warped boards. He

saw that the board in question was warped, but could not tell whether or not it was shimmed. It was held that the plaintiff was entitled to hold his verdict; that plaintiff had a right to assume to a reasonable extent that boards so warped that they should not be used would in fact not be used or would be shimmed; that he had the right to assume that reasonably safe scaffolding had been provided; and that it was *a jury question whether the dangerous condition of the plank was obvious.*

All the foregoing applies to the plaintiff in this case. Experienced railroad employees had been "measuring" the skids in the presence of the plaintiff only an hour before the accident. Plaintiff's employer had positioned the work and, testing the skids on edge, had found them safe. These factors could strongly have influenced the jury to conclude that the danger was not obvious. Plaintiff's employer was wrong as it turned out. Defendant's employees were right in their conclusion that the skids were dangerous "on edge." A warning from them which they were free to express and which would have been the easiest matter to give could have avoided the whole accident.

The Court below averred that plaintiff was in no position to say he was not warned. He is in position to say he was not warned for in fact neither defendant's employees (who knew) nor anyone else gave him any warning. So far as the circumstances themselves might be said to give him warning, this was a question of fact for the jury. The tilt might have been against the wall, a circumstance to negative obviousness of risk. The persons best qualified to know—the experienced railroad men, because they were nearest to the skids and measured them—said nothing, and this factor could well have been found by the jury to convey an assurance of safety to the party of scalers, on the basis either that the position was not dangerous, or that they had taken some simple corrective measure, such as the use of shims.

III. The question here involved is of great and demanding importance.

There are more than 5,000 foreign corporations doing business in the Commonwealth of Massachusetts, as disclosed by records of the Department of Corporations and Taxation. Annually a large number of claims against such citizens of other states as well as against individuals, citizens of foreign states, must arise. If the United States Courts become a haven for denial of jury trial and for adjustment of rights arising under the local law in such a marked conflict with established State law as is disclosed by the record in this case, then the normal pattern of removal will be seriously distorted, for selfish reasons unbecoming to modern and enlightened administration of justice. Unless this Court exercises its power of supervision it is likely that we shall have the unseemly and disturbing spectacle of one system and theory of law prevailing in the State Court and another and markedly different system prevailing in the District Court when exercising diversity jurisdiction.

Conclusion.

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Boston, Massachusetts,
Counsel for Petitioner.

Of Counsel:
THOMAS B. SHEA,
NATHAN GREENBERG.

Appendix.

United States Court of Appeals
For the First Circuit

No. 6353.

NEW YORK CENTRAL RAILROAD COMPANY,
DEFENDANT, APPELLANT,
v.
FREDERICK MOYNIHAN,
PLAINTIFF, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Before HARTIGAN and ALDRICH, *Circuit Judges*, and DAY, *District Judge*.

Timothy H. Donohue, with whom *Stephen A. Hopkins* and *Sherburne, Powers and Needham* were on brief, for appellant.

Thomas B. Shea, with whom *Nathan Greenberg* was on brief, for appellee.

OPINION OF THE COURT.

November 20, 1964.

ALDRICH, *Circuit Judge*. The plaintiff, an employee of Dyke Shute, a public weigher and sampler, was injured on the morning of November 28, 1962 while working on a pier in East Boston when two skids fell over onto him. The defendant railroad is the lessee of the pier. It appeals,

following a verdict for the plaintiff, because of the court's failure to grant its motion for judgment. It also asserts errors in the charge and sundry other matters.

Plaintiff's evidence would warrant the following. The section of the pier in which plaintiff was working was an enclosed shed about 35 yards wide by 70 long. A railroad track extends into the pier. The defendant makes a per diem charge to vessels docking alongside. It has nothing to do with the unloading of cargo, or the loading of it into trucks. If any freight is to be shipped out over its lines defendant hires a contractor to load its cars. On November 21-24 cargo was discharged from a vessel, including drums of aluminum oxide destined to be shipped out by rail. Apparently in connection with accepting the drums the consignee desired the services of Shute.[1] On the morning of November 28 three employees of Shute, including plaintiff, were engaged in emptying full drums into empty ones and weighing and sampling the contents. Shute had moved the drums to a separate space in the shed where they could be worked on. One drum was placed within six feet or less of two skids that were standing on edge against the wall. The skids, some thirteen feet long and four feet wide, and weighing 1,000 pounds, were owned by the defendant, and were furnished by it for the convenience of shippers. Skids (there were many in the shed besides these) were used primarily by longshoremen, but occasionally they were used by the contractor in loading defendant's cars. There was no evidence as to who had placed these particular skids where they were, or when they did so, but there was evidence that they had been there for a day or more.

While plaintiff was working with his back to the skids they fell over, causing him serious injury. No explanation

[1] There is no contention that the drums in question had been delivered to the defendant on November 28, or that defendant had any connection with Shute.

has been offered as to why they fell. Several employees of the defendant called by the plaintiff, however, and plaintiff himself, testified that it was dangerous to leave skids placed on edge, and that they were supposed to be left flat.[2]

Plaintiff makes much of the presence of two railroad carpenters measuring (but not touching) the skids on the morning in question prior to the accident, and the fact that they did nothing about their unsafe position. The carpenters were called by the plaintiff, and testified that attending to the position of the skids was not within their duties. There is no reason to doubt this disclaimer, particularly as much was made during the trial of the fact that there were a number of unions on the pier. However, quite apart from the presence of the carpenters, we will assume, from the length of time that the skids had been there, that the defendant was on notice. The defendant, accordingly, was under a duty. We will also assume in plaintiff's favor, because of the interest defendant might be thought to have in pleasing users of the pier, that plaintiff, in performing services for a consignee of cargo, could be found to be a business invitee of the defendant as distinguished from a

[2] Shute, called by the plaintiff, testified that he had initially considered the possibility, but after touching the skids and considering their weight had thought there was no danger of their falling. The court, however, during cross-examination cast doubts upon his qualifications in this respect. Frankly, it is not clear to us why the skids were likely to fall. The so-called "edge," as shown in plaintiff's photographic exhibit, is square, and of considerable width because of the skid's thickness. Nevertheless, the skids did fall, and on the testimony we must take it that to knowledgeable persons this was foreseeable. Shute's ignorance did not mean that he was indifferent to his men's safety. On the contrary, the inference is inescapable that had he known of the danger he would have placed the drums elsewhere. It is further clear, both from the testimony and the photograph, that there was ample space to have done so. In other words, this is not in any way a case where plaintiff was obligated to work where he did.

mere licensee. The questions, therefore, are what was the scope of defendant's obligations to plaintiff, and was it met.

In Massachusetts the duty towards an invitee is not what the district court frequently told the jury, to provide a safe place to work, but is normally in the alternative, to use reasonable care to provide a place which is safe, or to give warning to the extent that it is unsafe. *LeBlanc* v. *Atlantic Bldg. & Supply Co., Inc.*, 1949, 323 Mass. 702, 705; see *Wilson* v. *Conlin*, 1959, 338 Mass. 295, 297. In *Dunn* v. *Sammet*, 1956, 335 Mass. 162, at 163, the court spoke of this as the "familiar rule," and it is reiterated in a number of the cases cited by the plaintiff. The court sometimes recognizes an exception, where, because of convenience or necessity, the invitee might reasonably be expected to use the premises even with knowledge of the danger. See *e.g.*, *Hayes* v. *Boston Fish Market Corp.*, 1946, 319 Mass. 556. But *cf. O'Neil* v. *W. T. Grant Co.*, 1957, 335 Mass. 234. That exception applies only when the invitee could be said to be reasonable in consciously incurring the risk, *cf. LeBlanc* v. *Atlantic Bldg. & Supply Co., supra; Gadowski* v. *Union Oil Co.*, 1 Cir., 1964, 326 F. 2d 524, and does not apply when the invitee might reasonably be expected to confine himself to the safe portion of the premises. *Greenfield* v. *Freedman*, 1952, 328 Mass. 272. The warning need not be explicit, but may be implicit merely from the nature of the premises. *Vance* v. *The Wayside Inn, Inc.*, 1957, 335 Mass. 617; *O'Hanley* v. *Norwood*, 1944, 315 Mass. 440. Thus in *Rego* v. *Sagamore Mfg. Co.*, 1940, 305 Mass. 346, the defendant was washing its floor. Apparently it was customary for it to place a red sign indicating the danger. In ordering a verdict for the defendant the court stated that the absence of the sign was immaterial because the plaintiff had seen that the floor was being washed, and because, due to her familiarity with the premises (based on three weeks' employment) she must have known that the floor had spots of oil which would make it peculiarly slippery when wet.

In the case at bar the plaintiff had far greater familiarity, and actual, rather than presumed knowledge, of the unsafe condition. Plaintiff was 50 years old. He had worked around piers "pretty much all [his] adult life . . . [and] was familiar with the operation around piers and the equipment. . . ." Prior to his present job he had been a longshoreman. He had seen skids "for years," and was "familiar" with them. When he came to the section that morning where the skids were he observed them against the wall. Asked whether he was worried about them he replied, "Well, that wasn't my job, I had nothing to do with it. I had no reason to worry about it." Asked why he told no one, he said, "Well, I had no reason to because we had nothing to do with the skids."[3] "XQ. They looked all right to you?" "A. Well, they were on edge. I know they were dangerous because they are supposed to be lying flat on the deck. That's a safety rule." "XQ. Did you know then it was dangerous for them to be on edge?" "A. I know it was dangerous." Asked once more, ". . . you didn't worry about them?" he replied, "Well, I figured the railroad or shipping company was going to use them fast, so—they were around there and they were going to use them right away."[4]

---

[3] The significance of this testimony was pointed up by an argument made before us by plaintiff in another connection. If plaintiff was a mere licensee, the defendant's only duty was to refrain from wilful or wanton conduct, *i.e.*, gross negligence, or worse, a distinction we need not pursue. Plaintiff argued that this was supplied or shown by the reply of one of defendant's carpenters, when asked on the stand why they did not move the skids when they saw them on edge, "It ain't up to us." Plaintiff argued, what could be more callous? Apparently it is of no consequence when plaintiff shrugs off the warning implicit in the situation, but wanton when defendant's carpenters do so.

[4] The basis of this assumption is not clear because on plaintiff's own uncontradicted testimony no one came near the skids that morning except the carpenters with a tape measure.

Plaintiff's counsel, from plaintiff's use of the word "know" in the present tense, seeks to argue that it was only since the accident that plaintiff knew that it was dangerous for skids to be left on edge. We cannot agree. On other occasions the plaintiff used the present tense instead of the past. It is apparent on the record that he was not skilled in precise English. His counsel's contention would not only make his answers totally unresponsive, but if he meant what is now argued, the natural answer to the questions would have been a simple "No," not four sentences totalling thirty words. Furthermore, the other four answers we have quoted, giving other reasons for doing nothing about it, are entirely inconsistent with the thought that plaintiff did not know at the time that the skids were not supposed to be there. We cannot accept plaintiff's strict use of grammar which would produce so strained a result. Furthermore, in view of plaintiff's long knowledge, awareness on his part could be assumed. *Rego* v. *Sagamore Mfg. Co., supra; Flanders* v. *Pailey,* 1947, 320 Mass. 744.

We have examined the cases relied upon by the plaintiff. They are not in point. One group concerns hidden defects. Another is where there were special reasons why it might be expected that plaintiff would reasonably go where he did in spite of the known risk. A third is where the defendant was guilty of affirmative misconduct, such as negligent driving of a truck. In addition, plaintiff summarizes at some length three cases which he describes as "comparable situations," *Flaherty* v. *N.Y., N.H. & H. RR.,* 1958, 337 Mass. 456; *West* v. *Molders Foundry Co., Inc.,* 1960, 342 Mass. 8, and *Fahey* v. *Osol,* 1959, 338 Mass. 429. In *Flaherty* the plaintiff's employment required him to deal with the very situation which the defendant had created. In *West* plaintiff's work obliged him to go in the danger zone. In neither of these cases was there any question raised of obviousness of the danger. In *Fahey,* where that

matter was considered, the court expressly said that on the plaintiff's evidence it was not obvious. We cannot agree that these cases present comparable situations. Rather, plaintiff here knew of the danger, and chose to ignore it. He was free to conclude that the danger was not sufficient for him to worry (an attitude common, we may assume, to the vast majority of persons who get injured) but he was in no position to say that he was not warned. Correspondingly he was not privileged to put the knowledge which he had received out of his mind and then seek to charge the defendant. *LeBlanc* v. *Atlantic Bldg. & Supply Co., supra.*

Judgment will be entered setting aside the verdict and vacating the judgment thereon and ordering the entry of judgment for the defendant.